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IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

SALLIE J. McDANIEL ET AL.,
Appellants,

vs.

GEORGE M. TRAYLOR ET AL.,
Appellees.

No. [illegible]

BRIEF FOR APPELLANTS.

G. B. WEBSTER,
J. R. BEASLEY,
Counsel for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

SALLIE J. McDANIEL ET AL.,
Appellants,

vs.

GEORGE M. TRAYLOR ET AL.,
Appellees.

No. 295

STATEMENT.

This case appears for the second time in this court. As on the former occasion it is here upon a question of jurisdiction. The result of the former appeal is reported in 196 U. S. 415.

The original bill alleged that Hiram Evans, the ancestor of the complainants (who are again the appellants) died on April 13, 1891, possessed of an estate in real and personal property of the value of about $30,000, [redacted]; that among the assets of said estate was a certain drug store in Forrest City, Arkansas, which the administrator, James Evans, sold and delivered to John Evans, on or about the 1st day of May, 1891; that the defendants had claims against said drugstore, which were contracted by John Evans, while he owned and was operating it, and that he becoming insolvent, the defendants undertook to procure the allowance of these debts of John Evans against his farther's estate by concealment of these facts from the Probate Court and by fraudulently alleging and claiming the debts to be expenses of administration. It was further charged that this purpose was accomplished by concerted action between the several claimants and the administrator. It was averred that the judgments had become final before their invalidity was discovered by the complainants, so that no relief was possible by appeal, or similar proceeding; that the several claims so allowed, while in fact invalid, were at law liens upon the real estate inherited by the complainants from their father, which property was alleged to be of the value of $16,000.00. The prayer of the bill was that the judgment of the Probate Court allowing these claims be set aside and be decreed not to be valid or lawful liens against the real estate or upon the interest of the several complainants therein, and that the defendants be enjoined and restrained from asserting or enforcing the said judgments or taking any manner of benefit or profit thereunder. (Tr. 2.)

After the return of the case to the United States Circuit Court certain of the defendants answered

denying all the allegations of the bill and setting up a plea of *res adjudicata.* (Tr. 43.)

Issue having been joined the parties proceeded to the taking of proof, and, while John Evans was testifying in a similar case, it was discovered that the drugstore had never in fact belonged to the complainants' ancestor, but every since 1885 it had been the property of the firm of Marcus Collins & John Evans. At this the complainants procured leave to, and did file an amended bill putting in this allegation in place of the statement in the original bill. (Tr. 46.)

The cause at length proceeded to a hearing upon the proof taken and at the close of complainants' evidence the court made an order dismissing the bill for want of jurisdiction, upon the ground that the proof failed to show any conspiracy or federation in procuring the allowance between any two or more of the several complainants. (Tr. 73.)

The complainants exhibited in evidence at the hearing a certified list of claims allowed against the estate of Hiram Evans; a certified copy of a judgment for $500.00 in favor of Marcus Collins against John J. Evans, in the Circuit Court of St. Francis County, rendered April 23, 1890, (Tr. 52), and a certified copy of the mandate, judgment, and opinion of the Supreme Court of Arkansas, rendered March 1st. 1890 in the case of *Feucht vs. John J. Evans, et al.*, in which case N. W. Norton was attorney for Feucht et al., (See 52 Ark. 556), and R. J. Williams was one of the attorneys of record for John J. Evans et al.

The first mentioned document shows that all of the claims attacked in this proceeding were classed as expenses of administration—those of N. W. Wilkerson and Company in the sum of $1061.67 and $3353.33, and that of M. A. Houston in the sum of $250.00, not being involved in the present proceeding.

The complainants also offered the deposition of Marcus Collins, (Tr. 56), who testified that in 1884 he, N. W. Norton and one Hamilton composed the firm which owned the drug store in question. In Jan. or Feb., 1885 he sold his third interest to John Evans, and thereafter purchased the third interest of Hamilton, which interest he later sold to John Evans for $500.00, and took his note for the money. (Tr.57.) After the purchase of Hamilton's interest by Collins the business was conducted in the name of Collins and Evans.

It seems that Collins made a verbal agreement with Norton in the summer of 1885 for the purchase of the latter's interest in the drug store and was subsequently compelled to pay for it. (Tr. 57 and 59). And concerning this third interest which Collins got from Norton, he (Collins) swears that he never sold it to anybody or gave it to anybody. (Tr. 57.) When John Evans bought his second one-third interest in the drug store he paid Collins for it with a note for $500.00, dated October, 1885, and payable October, 1886, upon which Collins in 1890 recovered judgment. Execution was issued on said judgment Jan. 2nd, 1892, and returned Feb. 29, 1892 satisfied in full. (Tr. 52.)

The deposition of James Evans, who was the administrator, which had been taken for use in another case involving the same drug store, was also offered by the complainants. (Tr. 61.) He testified that the claims of Wilkerson & Company were presented to him by R. J. Williams, who was his attorney, as well as the attorney for John Evans and the attorney for the Wilkerson firm, although his relations with the latter were unknown to the administrator. (Tr. 62.) When asked why he allowed the debts which had been contracted by John Evans when he was owning and running the drug store, as claims against the

estate, he replied that his attorney, Williams, *advised him to allow them all*, and he therefore thought it was right to do so. (Tr. 64.)

The deposition of T. C. Merwin, clerk of the Probate Court of St. Francis County, (Tr. 71), was to the effect that James Evans, the administrator, was never authorized by that court to run a drug store and that he never made a settlement which was confirmed by the Probate Court.

The defendants offered no testimony whatever and upon the record thus made the Circuit court, as already stated, dismissed the complainants' bill for want of jurisdiction.

The errors assigned on this record and relied upon in this Court are as follows:—

First:—It was error on the part of the Circuit Court, under the opinion on the former appeal of this case, to deny jurisdiction and to dismiss the bill for want of jurisdiction.

Second:—It was error in the Circuit Court to find and hold that in order to maintain the jurisdiction any two or more of the defendants must have conspired together to procure the allowance of their claims, because an actual conspiracy was not necessary where the action and conduct of the defendants, acting by and through their attorneys, with the attorney of the administrator, were such as to procure the fraudlent allowance of the claims.

Third:—Because the true test of the jurisdiction in a proceeding of this kind is the value of the property upon which the inequitable liens rest, and not the amount of such liens, and the circuit court erred in not so finding and holding.

BRIEF.

I.

The Circuit Court erred in finding and holding that it had no jurisdiction because the complainants failed to prove any joint act of two or more of the defendants tending to procure the fraudulent allowance of their claims.

It was error because:

(a) The gravamen of the charge in the bill was that the defendants conspired with the administrator and thereby procured the allowances which otherwise would not have been made.

(b) The evidence was that Williams, as attorney for the administrator, advised the latter to allow all the claims while he was, unbeknown to the administrator, acting as attorney for one of the claimants. (*Transcript* p. 64.) The present record discloses Williams as the attorney for all of those claimants, including that one which he then secretly represented. (*Transcript* pp. 42, 46, 48.) These facts justify the conclusion that in procuring the administrator to allow as expenses of administration what were not valid claims of any nature, he was acting for all whose claims were so allowed. If he was, then his act was their joint act because done in their business and for their benefit.

Bethel Church v. Carmack, 2 Md. Ch., 143;
Chambers v. Hodges, 23 Tex., 104;
I. P. & C. R. R. v. Tyng, 63 N. Y., 653;
Griswold v. Gebbie, 126 Pa. St., 353;
Craig v. Ward, 2 Keyes, 287.

If his act was their act, then their wrong in procuring the illegal allowance while concealing from the probate court the fact that the claims were the debts of John Evans and not "expenses of administration," and the wrong of the administrator in consenting to and permitting the allowances when he necessarily knew that he had not incurred them in the performance of his trust, combined to bring the result complained of in the bill, and the concerted action necessary to create jurisdiction was established.

(c) The law only requires the highest quality of proof possible. Where the fact to be proved rests in the knowledge of the other party and he stands silent when evidence is given of other facts from which the ultimate fact to be proved may reasonably be inferred, it is to be considered as sufficiently proven.

Greenleaf, Evidence (16th Ed.) Sec. 79;
1 Starkie, Evidence, 54;
Lehman v. Knapp, 48 La. An., 1148 (20 So. 674);
Commonwealth v. Webster, 5 Cush., 316, *l. c.*
Heath v. Waters, 40 Mich., 457;
Conn. M. L. Ins. Co. v. Smith, 117 Mo., 261;
Mabary v. McClurg, 74 Mo., 575;
Runkle v. Burnham, 153 U. S., 225 *l. c.*
Choctaw & M. R. Co. v. Newton, 140 Fed., 238, *l. c.*
Gulf C. & S. Ry. v. Ellis, 54 Fed., 481;
Pac. C. S. Co. v. Bancroft W. Co., 94 Fed., 180;
Kirby v. Talmadge, 160 U. S., 379.

Here positive knowledge whether or not there was a conspiracy to which they were parties, and which resulted in the allowance of these claims alleged to be fraudulent, was in the hands of these defendants. They, better than any one else, for *the administrator is*

dead, knew the truth, and they were in court to speak. Yet in the face of the charges of the bill and the proof of facts raising a strong presumption of concerted action between them and the administrator, their voices are not heard in denial. When it is considered that fraudulent conduct such as is here charged is not plotted in public, nor enacted upon the house tops, but on the contrary is conceived in secret and effectuated in quietude it is at once apparent that the direct, positive and convincing proof ordinarily required is impossible, and that all due regard for the rights of these silent defendants does not demand it in the circumstances. Especially is it so under the rule that this court will look to all of the facts in determining the question of jurisdiction, the lack of which should appear with full certainty before a denial of jurisdiction will be affirmed.

Wetmore v. Rymer, 169 U. S., 115;
Put in Bay Co. v. Ryan, 181 U. S., 431;
Perry Co. v. Koesters, 152 Fed., 967;
McCarthy v. Am. T. Co., 143 Fed., 680, *l. c.*

Cicero said that to a wise judge proofs by reasoning are of more value than witnesses. Here they are at least as good when the witnesses who might controvert them do not speak.

> "It is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence, as knaves have usually sufficient cunning to have no witnesses present who can testify to their fraudulent contrivance."
>
> *Thompson v. Bowie,* 4 Wall., 473.

The rule that fraud is never presumed merely declares a principle of administration that the burden of proof as to the existence of a fact is upon the party alleging it.

16 Cyc., 1082.

But where one who has the burden of proof shows a state of facts raising a presumption in his favor, he establishes a *prima facie* case, and the burden, that is to say the duty of producing sufficient facts to satisfy the court or jury, shifts to the other party.

16 Cyc., 933-934.

In this connection regard must be had to the distinction between the differing meanings of the phrase "burden of proof." In one sense it imports the necessity of establishing certain facts as the prerequisite of the law's action, and it is in this sense that it is used in general statements, common among both the text writers and the judicial authors, to the effect that the burden of proof never shifts. In another sense it denotes that obligation which rests upon a litigant to show facts sufficient to satisfy the mind of the trier of facts, or, in other words, to create a *prima facie,* and this is the sense in which the term is here used.

Carver v. Carver, 97 Ind., 497, 510;
16 Cyc., 926.

II.

In a case of this nature the value of the property upon which the invalid lien rests rather than the amount involved in the lien, is the true test of jurisdiction.

It is beyond cavil that the judgment of the probate court in allowing these claims is a cloud upon the title of the complainants, and an impairment of their right to enjoy their interest therein, which, while valid at law is, by extrinsic facts, void.

> "Thus a suit to quiet title to parcels of real estate or to remove a cloud therefrom by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the

court under the statute only by the value of the property affected."

Smith v. Adams, 130 U. S., 175, *l. c.*
Parker v. Morrill, 106 U. S., 1.

In the latter case there was a cloud upon the title to a portion of the lands and the value of that portion was held to be the amount in controversy. Although the appeal was dismissed it was solely on account of the fact that the record failed to disclose the value of the lands.

Both these cases were cited and followed by the Circuit Court in the Western District of Texas in a suit to set aside fraudulent conveyances as a cloud upon the title.

Simon v. House, 46 Fed., 317.

"In a suit to quiet title it is not the value of the defendant's claim that constitutes the amount in controversy; it is the value of the whole of the real estate to which the claim extends."

Woodside v. Ciceroni, 93 Fed., 1.

In that case Judge Gilbert pointed out the reason for the rule and showed that the rights of the complainants were not confined to any definite portion of the real estate and that the claim of the defendant affected the right of the complainant to the enjoyment of the whole of his estate; or, in other words, that the lien affected every moiety of the entire estate and impaired the right of the complainant to the enjoyment of every portion of it.

Smith v. Adams was also followed in *Cowell v. City Water Supply Company,* 121 Fed., 53, where the plaintiff was the owner of but one bond of the value of $1000.00. Jurisdiction was denied there because he was the owner only of a separable interest amounting to less than the jurisdictional sum. The principle now contended for was fully recognized but held inapplicable under the facts of the case.

In the state courts, by the weight of authority, the rule is the same.

Fuller v. Grand Rapids, 40 Mich., 395;
Scripture v. Johnson, 3 Conn., 211;
Simon v. Richard, 42 La. An., 842;
Kahn v. Kerngold, 80 Va., 342;
Ayers v. Blair, 26 W. Va., 558.

ARGUMENT.

It will be observed from the ruling of the court below that the trial judge seems to have been of opinion that the complainants, in order to establish the jurisdiction, were obliged to prove that two or more of the defendants whose demands are here attacked, got together and agreed upon a joint course of action, although the bill charged in the usual words of the conspiracy clause that the defendants not only conspired together but also conspired with the administrator. The specific and material charge is that there was an agreement or understanding between the defendants on the one hand and the administrator on the other. We now contend that parties may conspire through their attorneys as well as in person and that where an attorney, representing claimants and the administrator, procures the latter to allow the claims when knowledge of the circumstances on the part of both would make it the duty of the one to advise against allowance and of the other not to allow them, the fraudulent conduct of the claimants acting through the same agent, sufficiently establishes the conspiracy charge.

The present record discloses without contradiction that R. J. Williams was the attorney of Wilkerson & Company while acting as attorney for the administrator and that it was upon his advice alone that the administrator allowed the defendants' claims.

The record is replete with proof that the same Williams is now attorney for the several defendants in this case. His name is signed to their answer. (Transcript, p. 46.) He appeared and made argument

for these defendants on the demurrer to the juirsdiction (Trancsript, p. 32.) And he appeared in their behalf to procure the setting aside of a decree *pro confesso.* (Transcript p. 42.) Our contention is that in these circumstances he will be presumed to have been the attorney for these same claimants at the time they proved up their claims, especially since the administrator says that he advised the allowance of them in favor of all of the defendants at the same time.

From time immemorial courts of equity have recognized the fact that fraud is conceived and executed in secret and that its perpetrator is generally at pains to see that the evidence of it is not left open. As this court said in *Thompson v. Bowie,* 4 Wall., 473:

> "It is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence, as knaves have usually sufficient cunning to have no witnesses present who can testify to their fraudulent contrivance."

And again in *Rea v. Missouri,* 17 Wall., 543:

> "To establish fraud it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient but in most cases it is the only proof that can be adduced."

If Williams was representing one of the claimants and at the same time advising the administrator, and by virtue of his dual position violated his duty to one for the benefit of the other, and if he is now appearing to defend the allowance in favor of that one and also appearing for the others to the same end, it is a strong presumption that he represented them also at the time the allowances were made. Especially is this true when he and they remained silent at the bar of the lower court in the face of the charges set forth in the bill. Had the conspiracy charge been unfound-

ed his natural course would have been to deny under oath that he acted for the other defendants in procuring judgment in their favor in the probate court, and they ordinarily would also have denied. Presumptions are, of course, but those inferences which the law draws in the absence of the facts, but all things will be presumed against the man who remains silent when he should speak. These facts, we think, sufficiently supply that proof which this court, in its opinion on the former case, said was necessary to maintain the jurisdiction. The words used in the opinion are these:—"If the plaintiffs do not prove such a combination and conspiracy in respect at least of so many of the specific claims as in the aggregate will be of the required amount, then their suit must fail for want of jurisdiction in the circuit court." By the expression, "such a combination and conspiracy" we understand the court to have meant such concerted action as resulted in a fraud upon the complainants, not that they were obliged to prove that the defendants held a mass-meeting at some place and adopted resolutions to defraud the estate. If Williams was representing them and acted fraudulently in procuring these allowances the fraud was the act of each and all of the persons for whom he acted, quite as much as if it had been done by each and all of them in person.

This conspiracy charge is to be considered in another light:—In the modern equity pleading it is regarded as an allegation more of form than of substance, and in Story on Equity Pleading, pp. 24-25, the learned author says that the confederation charge usually inserted in bills is ordinarily treated as surplusage, and quotes the assertion of Lord Redsdale that an answer to a charge of unlawful combination cannot be compelled. While it is true that in this case the conspiracy charge is of more than ordinary impor-

tance, the point we now urge is that the complainants are not to be held to a strict proof of it, but may be considered to have established it, so far as is necessary, by such proof as was given at the trial of this case in the circuit court.

If we are correct in the assertion that Williams' conduct in procuring the administrator to allow the demand of one of the defendants whom he then secretly represented, coupled with the fact that he is now (when the need of secrecy no longer exists) openly the attorney of all of them, raises the presumption that he was representing all of them when he poisoned the ear of the administrator with his unfaithful advice, then it must be held, for the jurisdictional purpose at least, that both the iniquitous purpose and the concerted action of the several defendants were established. He knew the truth as to the origin and nature of the claims because he was the real debtor's attorney, and knew that they were not expenses of administration because he was counsel for the administrator, and yet with this knowledge he violated his duty and prostituted his office by advising the administrator to allow them against the estate he was bound to protect. It is not likely that he would have voluntarily and gratuitously done such a thing. The ordinary fear of consequences would alone have deterred him, and the common knowledge of mankind would justify the conclusion that he, like his prototype of old, "covenanted for money." So we say that it was the voice of Jacob but the hand of Esau that brought about the fraudulent judgment of allowance against which the complainants here protest. With all this knowledge in his breast and with the consent of the administrator procured by his own infidelity, concealing what if known would have defeated the claims, he went into the probate court and secured the allowance (at least

of one claim) as Ananias "went in before the apostles and lied to the Holy Ghost." Can it be said in the face of all this that he was acting for but one claimant? He was in court, active in the defense of this case, and so were the several defendants, who having gathered the fruits of his unlawful traffic would now repudiate his agency in that gain, but neither he nor they gave tsetimony although they and each of them knew in their hearts whether or not there was a conspiracy or concerted action and could have supplied the positive proof. This, we claim, so strengthened the presumption of Williams' agency for all of the defendants as to transform it into a *prima facie* case in which a denial of jurisdiction was error, even under the narrowest possible construction of the opinion on the former appeal.

Against this our opponents will doubtless say that fraud is never presumed, but must be proved by clear and convincing evidence, all of which is true as a general rule. But that rule, which is merely administrative, means only that one who alleges an affirmative fact has the burden of proving it, and does not militate in the least against another equally well established rule—that where the party having the burden shows a state of facts which raise a presumption in his favor, he establishes a *prima facie* case and the burden, regarded as the duty of producing sufficient evidence to satisfy the trier of facts, shifts to the other party. Of course, the burden of proof, when the term is used to signify the obligation to show the existence of the facts upon which the relief demanded is necessarily predicated, never shifts, and citation of authority on that proposition is not difficult, but the burden of evidence, as it is perhaps better called when used in the sense of the duty of satisfying the court or jury, does, whenever that one who must fail in the absence of all evidence, establishes a presumption in his favor.

The defendants, silent in the face of facts so strongly indicating an understanding, if not an active conspiracy, are not unjustly dealt with if from those facts is presumed the existence of that which it was in their power to disprove were it not truth, because common experience teaches that persons standing in danger do not hold their peace unless to speak would be to condemn themselves; and courts ought not to pretend to be more ignorant than the rest of mankind. The books are full of cases where fraudulent purpose has been presumed from less suggestive circumstances than those here presented. Some of them are cited in the brief proper, and many more might be collected did time or space permit. The whole question then, if due regard is to be given previous expressions of this court, resolves itself into this: did the facts shown by the complainants—the harlotry of Williams in his professional relations to the estate, the claimants and the real debtor, his agency then for one of the fraudulent claimants, his concealment from the court of the known invalidity of the claims, and his agency now for all of the defendants who profited by the fraud—did the sum total of these create a condition in which the defendants were called upon to speak and tell what they must have known or suffer the conclusion that what they disclosed would have confirmed their adversaries' contention? If so, a *prima facie* case was made, the burden shifted, and the collusion was sufficiently established to sustain the jurisdiction.

We submit that the question must be answered in the affirmative. If there be doubt, it should be resolved in the appellant's favor, for they are now at the last door of hope. Should it be closed upon them they will lose the heritage for which they have fought so long and so bravely, and it will go to the payment of claims which, but for the fraud and concealment prac-

ticed in their very concoction, would never have gotten place upon the records of the probate court of St. Francis county. At the bar of this court, in the very sanctuary of the temple, stands urging that result the discredited and disloyal counselor who made it possible, and in his shadow, foul with the same stains, these appellees who repudiate him and yet demand the profits of his shame. That their voices will find no willing ears we can not doubt.

Respectfully submitted,

G. B. WEBSTER,
J. R. BEASLEY,
Counsel for Appellants.

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Supreme Court of the United States

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF ARKANSAS.

BRIEF FOR APPELLEES.

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